22474

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,	)	
v.	)	NO. ~~20803~~
HUGH BRYSON, Appellee.	)	

OPENING BRIEF OF APPELLANT

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UNITED STATES OF AMERICA, Appellant, v. HUGH BRYSON, Appellee.	NO. 20803 OPENING BRIEF OF APPELLANT

JURISDICTION

The appellee filed in the District Court a "Motion for Writ of Error Coram Nobis to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for other Requested Relief" (R. 1-10) [1/]. November 6, 1967, the District Court entered an Order setting aside petitioner's (appellee's) conviction and sentence, that he be released from parole and that he be relieved of the remaining portion of his fine (R. 92) [2/]. On December 4, 1967, the United States filed a notice of appeal to this Court (R. 93). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291.

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1 / References designated "R_" are to the Transcript of Record on file with this Court.

2 / The opinion and order has not been reported. It appears in the Transcript of Record at R. 77-92.

STATEMENT OF THE CASE

The appellee was indicted and convicted for violating 18 U.S.C. 1001 [3] (R. 77). The conviction was affirmed by this Court. Bryson v. United States, 238 F.2d 657; 243 F.2d 837, cert. den. 355 U.S. 817. Denial of a motion for reduction of sentence was affirmed, Bryson v. United States, 265 F.2d 9, cert. den. 360 U.S. 919 (R. 2-3). On May 24, 1967 (R. 1) the appellee filed the motion which resulted in the order now on appeal, as just stated.

STATUTES INVOLVED

18 U.S.C. 1001 Statements or entries generally.

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (formerly 29 U.S.C. (1958 ed.) 159 (h)), which was repealed by Section 201(d) of the Labor-Management

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3 / The District Court referred to Section 1001 as "the general federal perjury statute (R. 77). The section defines the offense to include the making of false writings "in any matter within the jurisdiction of any department or agency of the United States".

Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of /sections 286, 287, 1001, 1022 and 1023 of Title 18/ shall be applicable in respect to such affidavits.

Section 504 of 29 U.S.C., as amended in 1959, provided in pertinent part:

> § 504. Prohibition against certain persons holding office; violations and penalties.
>
> (a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve-
>
> (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, * * *
>
> * * * * *
>
> during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment * * *.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court did not have jurisdiction under Section 2255 of Title 28 U.S.C. to vacate appellee's sentence.

2. The District Court erred in holding that it had not had jurisdiction to convict and sentence the appellee under 18 U.S.C. 1001.

3. The District Court erred in basing its Order on a holding that Section 9(h) of the Taft-Hartley Act was unconstitutional.

4. The District Court erred in holding Section 9(h) unconstitutional, because:

a. Section 9(h) was not a bill of attainder;

b. The word "affiliated" in Section 9(h) was not "overbroad." Killian v. United States, 368 U.S. 231; Bryson v. United States, 238 F.2d 657 (C.A. 9).

SUMMARY OF ARGUMENT

The District Court vacated appellee's conviction on the ground that: (1) Congress did not intend that Section 1001 of Title 18 U.S.C. should apply to the filing of false statements under an unconstitutional statute, and, (2) Section 9(h) of the Taft-Hartley Act of 1947, which was repealed in 1959, was unconstitutional as a bill of attainder, and (3) Section 9(h) was also unconstitutional insofar as it called for filing an affidavit with the National Labor Relations Board that the

union officer filing the affidavit was not "affiliated" with the Communist Party. The court said that the term "affiliated" was "overbroad" and could not be a basis for a criminal conviction.

We submit that the District Court erred on all four grounds we have stated: (1) There was no jurisdiction in the District Court to vacate sentence under Section 2255 of Title 28 U.S.C. because appellant was not"in custody", as that term is defined by the case law; (2) Whether Section 9(h) was constitutional or not, an indictment charging a violation of 18 U.S.C. 1001 stated a crime against the United States,[4/] as the Supreme Court in effect held in 1966. Dennis v. United States,384 U.S. 855, 864-867; (3) As of the date when Bryson filed his false affidavit with the Labor Board the law as stated by the Supreme Court was that Section 9(h) was not a bill of attainder and the filing of a false affidavit was a deliberate flouting of that law. Dennis v. United States, supra; (4) The term "affiliated" as used in the context of Section 9(h) was not ambiguous or "overbroad" and had a well settled and understood meaning in the law. Killian v. United States, 368 U.S. 231, 254-258.

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4 / A violation of 1001 is not "perjury", although the District Court said the conviction was for perjury (R. 77). See, Fisher v. United States, 231 F.2d 99, 105-106 (C.A. 9); Sells v. United States, 262 F.2d 815, 821-822 (C.A. 10), cert. den., 360 U.S. 913.

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER SECTION 2255 OF TITLE 28 U.S.C. TO VACATE APPELLEE'S SENTENCE

Section 2255 of Title 28 U.S.C. provides the collateral attack procedure for "a prisoner in custody under sentence," in the same manner and scope as habeas corpus. For a convicted federal offender, it is the equivalent of habeas corpus. United States v. Hayman, 342 U.S. 205 (1952).

It has been uniformly held that to invoke the jurisdiction of the court, some form of custody is necessary. From an early view that only institutional confinemement would suffice to be able to allege custody [5], the meaning has broadened to encompass restraint under parole and probation.[6]

However, there must be a provable allegation of "custody" in order to proceed under Section 2255, and appellee was not - under any view - in custody when this petition was filed. Bryson had been imprisoned, paroled, and discharged by operation of law prior to filing this motion. Unless the United States could have come to a court

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5/ Van Meter v. Sanford, 99 F. 2d 511 (C.A. 5, 1938); Owens v. United States, 174 F. 2d 469, 470 (concurring opinion) (C.A. 5, 1949).

6/ Parole is "custody": Jones v. Cunningham, 371 U.S. 236 (1963). This Circuit reached such a conclusion prior to Jones in Hoptowit v. UnitedStates, 274 F. 2d 936, 938 (C.A. 9, 1960). Probation is "custody" in the Second Circuit, United States v. Re, 372 F. 2d 641 (1966), but being on bail is not "custody" in this Circuit. Matysek v. United States, 339 F. 2d 389 (1964).

in 1967 and asked for a warrant to incarcerate Bryson for non-payment of the fine, Bryson cannot claim any restraint upon his liberty.

Bryson surrendered to the United States Marshal in January 1958 to serve a five year sentence imposed by the District Court. His sentence began when he was received at the institution designated by the Attorney General (18 U.S.C. Sections 3568, 4082(a)). He was released upon parole in December of 1959, pursuant to 18 U.S.C. Sections 4202 and 4203. Under 18 U.S.C. Section 4164, he would remain as if on parole until the expiration of five years. At that time, he is discharged (Cf. 18 U.S.C. Section 4163).

Bryson was free of all restraint in January 1963.

The maximum period for which Bryson could be imprisoned - absent bad conduct on his part - was five years less 180 days (18 U.S.C. Section 4164). During the last 180 days he is deemed as if on parole, and jurisdiction may be asserted over him on that basis. Singleton v. Looney, 218 F. 2d 526 (C.A. 10, 1955). But once he passes the 180 day period, there is no jurisdiction over him. After January 1963, the United States had but one remedy to enforce payment of the fine - civil suit.

It is possible to argue that during the five year period after sentence, Bryson could have been imprisoned for nonpayment; e.g., a two year sentence could have been imposed, with the condition that the defendant stand committed until the fine was paid. This could conceivably vest the court with jurisdiction to imprison the defendant up to the maximum term which could have been imposed under the statute,

five years, unless the defendant discharged the fine obligation through a pauper's oath. (18 U.S.C. Sections 3565 and 3569). Should Bryson have been released from the two year sentence, the United States could have sought to imprison him for nonpayment during the remainder of the maximum term possible under the statute. 7/

The Board of Parole continued to assert jurisdiction over Bryson after 1963. However, it is obvious that it could not imprison him from, for example, the day he filed his present petition until this matter is decided. Of course, it did not do so, and it is for this very reason that he cannot claim to be "in custody" under any construction of those words to date.

Bryson cannot assert to this Court that an order releasing him from custody could be directed to anyone - there is no respondent to an order. Habeas corpus, and Section 2255, require a situation in which such an order could command release from someone's restraint. None is possible here. Compare: Ex Parte Endo, 323 U.S. 283, 304 (1944).

The relief sought under Section 2255 must therefore be denied for lack of jurisdiction.

7/ Cf.: United States v. Gottfried, 197 F. 2d 239 (C.A. 2, 1952). Gottfried notes that the Board of Parole can assert jurisdiction over a defendant who has not paid a "committed fine" for the period of imprisonment "plus any further period until the fine is paid or otherwise discharged according to law." 197 F. 2d 241. A "committed fine" is one where the judgment directs imprisonment until the fine is paid. 18 U.S.C. Section 3565; Cohen v. United States, 7 L. ed. 2d 518, 520 (1962). This Circuit, in Panno v. United States, 203 F. 2d 504, 509-510 (1953), and Callahan v. United States, 371 F. 2d 658 (1967), noted the provisions of Section 3565 of Title 18 U.S.C., but was not dealing with expired periods of penalty. United States v. Baird, 241 F. 2d 170 (C.A. 2, 1957), suggests that imprisonment past the expired term could occur, as an incident of contempt power. But Baird was not concerned with the issue herein. Whether imprisonment on a contempt theory, in a period outside the limits set by the penalty statute, could result must be considered in the light of Shillitani v. United States, 384 U.S. 364, and Cheff v. Schnackenberg, 384 U.S. 373 (1966).

II. WHETHER SECTION 9(h) OF THE TAFT-HARTLEY ACT WAS CONSTITUTIONAL OR UNCONSTITUTIONAL, THE COURT WHICH TRIED, CONVICTED, AND SENTENCED BRYSON FOR VIOLATION OF 18 U.S.C. 1001 HAD JURISDICTION.

The net effect of the District Court's opinion is: Section 9(h) of the Taft Hartley Act [8/] was unconstitutional, so it was "no law", and gave the same court when it tried Bryson no jurisdiction, although as of the time of Bryson's affidavit and of his trial, the Supreme Court in American Communications Assn. v. Douds, 339 U.S. 382, had held Section 9(h) constitutional. See also, Osman v. Douds, 339 U.S. 846 (as to "membership" and "affiliation")

Even assuming for the sake of argument that the decision of the Supreme Court in 1965, in United States v. Brown, 380 U.S.437, calls in question the continued validity of the Douds cases as constitutional law, the court's ruling runs counter to the 1966 decision of the Supreme Court in Dennis v. United States, 384 U.S. 855, in which the very question of the applicability of the provisions of 18 U.S.C. 1001 to the filing of false affidavits under Section 9(h) was presented. The Court, referring to United States v. Brown, supra, decided (pp. 864-867) that it was unnecessary to reconsider Douds, "because the claim of invalidity of Par. 9(h) would be no defense to the crime of conspiracy charged in this indictment" (p. 867).

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8 / Enacted in 1947, repealed in 1959.

The Court stated:

> "It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. * * * There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge;" citing Kay v. United States, 303 U.S. 1.6;[9/] United States v. Kapp, 302 U.S. 214; United States v. Williams, 341 U.S. 58; United States v. Remington, 208 F.2d 567, 569 (C.A. 2d Cir., 1953), cert. den. 347 U.S. 913; United States v. Winter, 348 F.2d 204, 208-210 (C.A. 2d Cir. 1965), cert. den., 382 U.S. 955.

The Court went on to say:

> "Petitioners seek to distinguish these cases on the ground that in the present case the constitutional challenge is to the propriety of the very question - Communist Party membership and affiliation-which petitioners are accused of answering falsely. We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioner's fraud. It is not an action to enforce the statute claimed to be unconstitutional." (emphasis added)

9/ In Kay the Court said, "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without Constitutional sanction."

Dennis was a case of conspiracy to defraud the United States, in which 6 defendants were convicted.[10] The District Court attempted to distinguish Dennis by saying that the conduct of the defendants in that case was "particularly onerous" (R. 86-87). In the present case, the court said, Bryson's conduct was "less onerous", so he was entitled to urge 9(h) was unconstitutional (R. 86-87). Bryson's false affidavit, of course, can be said to be "less onerous" if we consider 6 false affidavits to weigh more than one. In Dennis, the Court said, the defendants' "knew and believed that they were lying as to their membership in the Party and that they were defrauding the government. In contrast, Bryson has at all times denied the falsity of his affidavit, while in Dennis only the conspiracy was factually challenged" (R. 85). The fact is that in Dennis all the convicted defendants entered a general plea of "not guilty" and put the government to its proof of falsity as well as of conspiracy or agreement. Bryson, like the Dennis defendants, filed a false affidavit in order to secure for his union, as well as for himself, the advantages of access to the facilities of the Labor Board (Leedom v. International Union, 352 U.S. 145) and, like them, he pleaded "not guilty". Filing a false statement is a separate offense in the Code from a conspiracy to defraud or to commit offenses, but Congress did not distinguish

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10 / In a similar case, West v. United States, 274 F.2d 885 (C.A. 6) cert. den., 365 U.S. 811, defendants filing false affidavits were convicted of a conspiracy to commit an offense against the United States.

between them when it came to prescribing penalties. The maximum statutory penalty is as great for a violation of Section 1001 as for a violation of Section 371; one is as "onerous" as the other. To an indictment under neither section is the asserted unconstitutionality of Section 9(h) a defense.

This Court twice affirmed Bryson's conviction, and we are justified in assuming that there was competent and substantial evidence to sustain the verdict. (Glasser v. United States, 315 U.S. 60; Carlson v. United States, 187 F.2d 366, 370 (C.A. 10), cert. den. 341 U.S. 940); and it follows from the verdict that the falsity of Bryson's statement was willful and knowing as required by the language of Section 1001.

The District Court interpreted 1001 as protecting only the functions of government authorized by a statute which was constitutional, as of 1967, citing United States v. Gilliland, 312 U.S. 86 and Ogden v. United States, 303 F.2d 724 (C.A. 9, 1962) (R 90); holding Section 9(h) to have been unconstitutional, it inferred that Congress did not intend that 1001 apply in such a situation (R 92).

That conclusion is contrary to the course of authority. All that the opinion in Gilliland does is recite the language of the statute; it does not interpret the word "authorized", and it does not say "only". In Dennis the Court dealt with the point and said that the argument here made by appellee "assumes that for purposes of

Section 371, a governmental function may be said to be 'unlawful' even though it is required by statute and carries the fresh imprimatur of this Court" (p. 867). 11 /

The rule of "colorable authority" has been frequently applied in cases under Section 1001. See, Humble Oil and Refining Company v. United States, 198 F.2d 753, 756 (C.A. 10), and cases cited. It is but another way of stating that under 1001 the constitutionality of the underlying statute is not an issue.

The administration of justice as a practical matter must take into account practical considerations and limitations. The Supreme Court has not interpreted the Constitution as calling for the broad, unqualified application of the rule of retroactivity of a determination of unconstitutionality.

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11 / In Ogden v. United States, supra, this Court said:
"One who has given false answers to material inquiries regarding a matter colorably within the authority of a government agency may not defend a subsequent prosecution under 18 U.S.C.A. Par. 1001 on the ground that the governmental operations involved were in fact vulnerable to constitutional attack" (p. 731), and it also said (p. 731 n 18); "...in this criminal prosecution for false denial of membership or affiliation with a single organization, we are not concerned with whether defendant might have resisted the inquiry into his organizational associations on the ground that it was unjustifiably broad".

> The actual existence of a statute, prior to such a determination is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.
>
> * * * * *
>
> /District Courts'/ determination of such questions, while open to direct review, may not be assailed collaterally. Chicot County Dist. v. Bank, 308 U.S. 371, 374, 376.

See also, Warring v. Colpoys, 122 F. 2d 642 (C.A.D.C.), cert. den. 314 U.S. 678. And in the recent case of Johnson v. New Jersey, 384 U.S. 719, 728, the Court said that it is not to disparage in any way a constitutional guarantee by declining to apply it retroactively, it is a matter of the practical administration of justice. Section 9(h) was on the statute books for some 12 years, and the digests and the annotated Code disclose the substantial number of cases in which it was interpreted and applied.[12/]

Applying the practical approach of the Chicot and Johnson cases we suggest that to vacate and set aside a 12 year old conviction (1955), which was affirmed by this Court and in which the appellant there (appellee here) made the same contentions he has advanced here, is to open a Pandora's box of problems and troubles. The Supreme Court denied certiorari, and no judgment of conviction was ever more final than Bryson's. To sustain the judgment of the District Court in the present proceeding may well lead to developments in the law of the finality of judgments, in the law of attainders, and in the interpretation of the First Amendment, which we cannot even imagine - and

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12 / The District Court pointed out that "No case has held Section 9 unconstitutional" (R. 83), and then proceeded to do just that.

all in a case which the question of constitutionality was not an issue and should not have been considered.

III. SECTION 9(h) OF THE TAFT-HARTLEY ACT WAS CONSTITUTIONAL

We have demonstrated that the District Court erred in deciding the question of the constitutionality of Section 9(h) of the Taft-Hartley Act. Whether that section was constitutional or unconstitutional was not an issue properly to be considered under an indictment for violation of Section 1001. In order, however. to present a complete statement of the Government's position, we propose to argue that, despite United States v. Brown, supra, and the other recent cases relating to the First Amendment cited by the District Judge, Section 9(h) was a constitutional and valid statute of the United States while it was on the books.

a. Section 9(h) was not a bill of attainder

We must note that the statute invalidated as a bill of attainder in United States v. Brown was not Section 9(h), which had been repealed in 1959, but a successor statute with much the same objective, but quite different from 9(h) in structure and application. Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 - which was before the Court in Brown (supra, p. 9) said, in effect to members and affiliates of the Communist Party - "You are forbidden to serve as union officers." Congress had named the Communist Party "in no uncertain terms" and had directed that its members "cannot hold union office without incurring criminal liability," 381 U.S. at 450.

This, the Court held, violated the constitutional rule that prohibits Congress from "specify/ing/ the people upon whom the sanction it prescribes is to be levied." 381 U.S. at 461.

In contrast, Section 9(h) said, "If you serve as union officers, your union will be unable to use the facilities of the National Labor Relations Board." The later Act imposed a prohibition, plus a criminal penalty; 9(h) was described by the Court in Douds as a "discouragement" (339 U.S. at 402).

This distinction is relevant to the question whether Section 9(h) constituted a bill of attainder. Congress must often impose restrictions of various kinds on the basis of legislative findings which "specify the people upon whom the restriction is levied", 381 U.S. at 461. Yet not every such restriction must fall as a bill of attainder, although every restriction or regulation may be felt as a deprivation or a punishment by those regulated. See, Wickard v. Filburn, 317 U.S. 111, 133.

Congress has provided in 28 U.S.C. 458, for example, that "/n/o person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." The statute marks out two very definite classes - i.e., judicial officers and their close relatives - it does not impose criminal sanctions upon either. It disqualifies brothers and sisters of judges from holding office in their relatives' courts, but that restriction can

hardly be deemed the sort of "deprivation" to which the constitutional bill-of-attainder provision applies. Nor, we submit, can it be claimed that the bill-of-attainder clause is violated by 5 U.S.C. 118i, which states, "/n/o officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns." Although federal employees are by statute deprived of the right to participate in political campaigns such regulation of their activity is not sufficiently substantial to offend the bill-of-attainder clause.

In both of the instances cited Congress was obviously concerned with evils which might be caused by persons other than those in the group specifically described in the statute and which are not necessarily produced by all those persons who are within the group. Yet in each instance Congress has made a legislative finding which has narrowed the group to which the statutory restriction applies.

We submit that even under the Brown decision the nature of the "deprivation" is a material element in determining the statute's constitutionality. Where, as under Section 9(h), the statute imposes no immediate criminal sanction, but merely acts as an indirect "discouragement," the effect is more regulatory than punitive, and it is not, therefore, sufficiently substantial to invalidate Congress' legislative determination regarding the scope of the evil.

b. "Affiliated" in Section 9(h) was not "Overbroad"

The District Court added to "bill of attainder" as a second ground for the invalidity of Section 9(h): that the word "affiliated" was "ambiguous" (R. 85) and "overbroad" (R. 89), so as to infringe appellee's rights of speech and assembly under the First Amendment. R. 88-89, citing cases like Keyishian v. Board of Regents, 385 U.S. 589; Elfbrandt v. Russell, 384 U.S. 11; Aptheker v. Secretary of State, 378 U.S. 500, and other cases (R. 88-89).

Taking "overbroad" at what would seem to be its ordinary meaning in everyday speech, it means, we think, "vague and insufficiently precise to inform a person subject to it of his rights and obligations." See, for a frequently cited case, Winters v. New York, 333 U.S. 507, cited in Dombrowski v. Pfister, 380 U.S. 479, 491, n. 7.[13/]

Obviously, few words, if any, are as precise and invariable in meaning as we might like to have them. "Affiliated," however, has had a well-settled and definite meaning in law in contexts dealing with the relationships of individuals to organizations, and, specifically,

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13/ The District Court noted the suggestion made by Bryson that at his trial, the jury requested, and was refused, a dictionary to seek help in defining "affiliation." In Fisher v. United States, 231 F. 2d 99, Chief Judge Denman for this Court disapproved of the reading to the jury of a dictionary definition of "membership" (231 F. 2d at 107), as being inadequate.

Winters used the words "vague and indefinite"; "overbroad" had not yet been coined.

as used in Section 9(h). In Killian v. United States, 368 U.S. 231, a Seventh Circuit case for violation of 1001, decided in 1961, the Court approved an instruction which read in part:

> "The verb 'affiliated,' as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.
>
> "A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis." 368 U.S. at 254-255, n. 13.

The Court noted that, "In Bryson v. United States, 238 F. 2d 657, 664, the United States Court of Appeals for the Ninth Circuit found an identical instruction to be 'full and complete' and said that it 'adequately informed the jury of the meaning of the term /affiliated/ and provided an adequate standard for evaluating the evidence.'" (p. 256).

In addition the Court in Killian cited as supporting the instruction as to the meaning of "affiliation," the opinion of Justice Burton in Jencks v. United States, 353 U.S. 657, which referred to "affiliation" as requiring a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for a charge of a breach of good faith'" (368 U.S. at 255) and opinions of Courts of Appeals in the Sixth and Tenth Circuits, and pointed out that "affiliated with" is

"necessarily subjective," but is a fact which may be proved by evidence of objective facts and circumstances (368 U.S. at 257).[14/]

When Bryson in 1951 signed the affidavit which was the basis for his conviction he was experienced in the labor movement and he consulted with counsel (265 F. 2d 9, 11-12 (C.A. 9), cert. den., 360 U.S. 919); there can be no doubt that he was cognizant of the Supreme Court decision in Douds.

In Aptheker v. United States, 378 U.S. 500, the Court did not pass upon the First Amendment questions mentioned by the District Court and the opinion does not support the argument that Section 9(h) was invalid on that ground (p. 504). In Aptheker it was conceded that the restriction imposed by the statute directly affected "the right to travel * * * protected by the Fifth Amendment" (378 U.S. at 505), and the principal issue was whether the restriction upon this constitutionally protected liberty amounted to "reasonable regulation" (ibid.). The parallel freedom in this case is the freedom to serve as a union officer - which has not been expressly

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14/ The Court in Killian also traced the definition of "affiliated" back to the early case of U.S. ex rel Kettuner v. Reimer, 79 F. 2d 315 (C.A. 2), and Bridges v. Wixon, 326 U.S. 135 (368 U.S. at 256, n. 14).

The District Court stated that in Douds Justice Frankfurter indicated doubts as to whether "membership" and "affiliation" stood "on equal constitutional footing" (R. 85, 86). The text of the opinion (339 U.S. at 420) indicates that Justice Frankfurter's doubts related rather to that part of Section 9(h) which called for an oath dealing with "beliefs" rather than to "membership in, or affiliation with" the Communist Party. See the companion case of Osman v. Douds, 339 U.S. 846, 847.

or impliedly recognized by any court as a constituionally guaranteed "liberty."

There are other differnces between this case and Aptheker. The Court noted in Aptheker, the statute in that case applied "whether or not the /Communist Party/ member actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or 'Communist-front' organization." 378 U.S. 509-510. Section 9(h) obviously applies only to knowing members and affiliates of the Communist Party.[15/] In addition, the statute held invalid in Aptheker effectively prohibited foreign travel by Communist Party members irrespective of the purpose of the travel. 378 U.S.at 511-512. Section 9(h) was confined to particularized conduct (union officership) which presents a specific evil (the danger of political strikes). Hence, Section 9(h) was "more discriminately tailored to the constitutional liberties of individuals" (378 U.S. at 514) than the passport restrictions in Aptheker.

It is true that one of the vices of the statute held unconstitutional on its face in Aptheker was that it "rendered irrelevant the member's degree of activity in the organization and his commitment to its purpose" (378 U.S. at 510), and Section 9(h) in this case is similar, in that respect, to the statute involved in Aptheker (378 U.S. at 510). But an important element in the Aptheker decision was the Court's conclusion that the end

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15/ The terms "Communist-action" and "Communist-front" occur in the Internal Security Act of 1950, 50 U.S.C. Sec. 785, which was in question in Aptheker.

which Congress wished to achieve - i.e., to restrict the freedom of Communist agents to travel abroad and act as courier for ventures in espionage or sabotage - could have been achieved by considering membership in the Communist Party not as an absolute disqualification but as "one factor to be weighed" (378 U.S. at 513) in the passport screening process - as in federal employment. In Section 9(h), however, Congress, weighing all the factors pro and con, eschewed such an administrative screening process (Leedom v. International Union, 352 U.S. 145), and chose instead to subject the filing of affidavit to the sanctions of Section 1001. Congress acted reasonably and properly in this area, taking all the factors into account, by making affiliation (or membership) the touchstone, subject to a restriction against false statements.

The District Court also cited Scales v. United States, 367 U.S. 203, as an authority for requiring a "specific intent" (R. 88-89). In Scales the Court read the requirement of "specific intent" into the criminal statute itself (367 U.S. at 224-228). In 9(h), by invoking Section 1001, it brought into play that statute's own "specific intent," "knowingly and willfully," and the knowing falsity of the statement made.[16/]

The District Court also stated that, "To question one merely about his membership or affiliation violates the First Amendment" (R. 88). As phrased the statement is certainly too sweeping. See,

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16/ It is, of course, not necessary that the fraud or deceit practiced by the statement involve a pecuniary loss to the United States. Humble Oil & Refining Co. v. United States, 198 F. 2d 733 (C.A. 10), and cases cited.

Barenblatt v. United States, 360 U.S. 109, 126-128; Wilkinson v. United States, 365 U.S. 399, 413-415; Braden v. United States, 365 U.S. 431, 433-435. [17/]

The complete answer to appellee's contentions is that it was not necessary to consider the constitutionality of Section 9(h). Appellee was convicted by a jury of a willful and knowing violation of Section 1001 of Title 18, and questions regarding the validity of his conviction and the construction or constitutionality of Section 9(h) are irrelevant. Dennis v. United States, 384 U.S. 855.

17/ In some of the cases cited by the Court involving State statutes and regulations the very complexity of the enactment and wide sweep of the language might have justified a reversal (for examples, Keyishian v. Board of Regents, 385 U.S. 589; Dombrowski v. Pfister, 380 U.S. 479), at least on Fifth Amendment grounds, and possibly the First Amendment and for the reason that they applied too broadly. See, Cole v. Young, 351 U.S. 536, 554.

CONCLUSION

For the reason stated, it is submitted that the order of the District Court should be set aside and the conviction and sentence of the trial court re-instated.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing Opening Brief of Appellant was this date mailed to the following: (3 copies)

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